No. _____

In The

Supreme Court of the United States

October Term, 1994

STATE OF WISCONSIN,

Petitioner,

v.

CITY OF NEW YORK, ET AL.,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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March 31, 1995

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QUESTION PRESENTED

Whether the July 15, 1991, decision of the Secretary of the United States Department of Commerce not to substitute statistically adjusted census numbers for the 1990 decennial census totals previously reported by the President for the reapportionment of Congress and transmitted to the States for use in redistricting was consistent with the language of the Constitution and the constitutional goal of equal representation.

LIST OF PARTIES

The parties to the proceeding in the court of appeals whose judgment is sought to be reviewed were the City of New York; State of New York; City of Los Angeles; City of Chicago; Dade County, Florida; United States Conference of Mayors; National League of Cities; League of United Latin American Citizens; National Association for the Advancement of Colored People; Marcella Maxwell; Donald H. Elliott; John Mack; Olga Morales; Timothy W. Wright, III; Raymond G. Romero; Antonio Gonzales; Athalie Range; City of Atlanta, Georgia; Maynard Jackson, Individually and as the Mayor of the City of Atlanta; Florida House of Representatives; Florida State Conference; Miguel A. De Grandy; Willye Dennis; Mario Diaz-Balart; Dr. Charles Evans; Rodolfo Garcia, Jr.; Bollowy L. "Bo" Johnson; Alfred J. Lawson, Jr.; Willis Logan, Jr.; Johnnie McMillan; Alzo J. Reddick; Peter Rudy Wallace; T.K. Wetherell; State of Texas; City of Phoenix, Arizona; State of New Jersey; State of Florida; City of Cleveland, Ohio; City of Denver, Colorado; City of Inglewood, California; City of New Orleans, Louisiana; City of Oakland, California; City of Pasadena, California; City of Philadelphia, Pennsylvania; City of San Antonio, Texas; City of San Francisco, California; Broward County, Florida; State of Arizona; City of Baltimore, Maryland; City of Boston, Massachusetts; City of Long Beach, California; City of San Jose, California; Los Angeles County, California; San Bernardino County, California; District of Columbia; Navajo Nation; State of New Mexico; City of Tucson, Arizona and Council of Great City Schools; the United States Department of Commerce; Ronald H. Brown, Esq., As Secretary of the United States Department of Commerce; Michael R. Darby, As Under Secretary for Economic Affairs of the United States Department of Commerce; Bureau of Census; Barbara Everitt Bryant, As Director of Bureau of Census; William J. Clinton, As President of the United States; Donnald K. Anderson, As Clerk of the United States House of

Representatives; Michael Espy, As Secretary of Agriculture; Donna E. Shalala, As Secretary of Health & Human Services; Henry Cisneros, As Secretary of Housing & Urban Development; Robert B. Reich, As Secretary of Labor; Federico Pena, As Secretary of Transportation; Richard W. Riley, As Secretary of Education; State of Wisconsin and State of Oklahoma.

The People of the State of California *ex rel.* Daniel E. Lungren, Attorney General, and County of Hudson, New Jersey, were parties to the proceedings in the district court whose judgment was vacated by the court of appeals, but were not parties to the proceedings in the court of appeals whose judgment is sought to be reviewed.

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OTHER AUTHORITIES

The State of Wisconsin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App. 1-40 is reported at 34 F.3d 1114. The opinions of the district court App. 41-95; App. 96-120; App. 121-134 are reported at 822 F. Supp. 906, 739 F. Supp. 761 and 713 F. Supp. 48. The decision of the Secretary of Commerce App. 135-415 is published in 56 Fed. Reg. 33582.

JURISDICTION

The judgment of the court of appeals was entered August 8, 1994. The State of Wisconsin petitioned for rehearing on August 22, 1994, which was denied on January 4, 1995. App. 416-418.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are U.S. Constitution art. I, § 2, cl. 3, *amended by* U.S. Constitution amend. XIV, § 2; U.S. Constitution amend. V; U.S. Constitution, amend. XIV § 1; and U.S. Constitution amend. XV, § 1. Statutes involved are 2 U.S.C. § 2a, 13 U.S.C. § 141 and 13 U.S.C. § 195. The pertinent text of these provisions is set forth at App. 422-427.

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[1] The State of Oklahoma's petition for rehearing was denied on December 12, 1994. App. 419-421.

STATEMENT OF THE CASE

This case concerns the ability of federal courts to decree equality by deciding complex questions of statistical methodology regarding the best way of conducting the decennial census.

Following the December 1987 decision in *Cuomo v. Baldrige*, 674 F. Supp. 1089 (S.D.N.Y. 1987), upholding the results of the 1980 census, the States of New York and California, together with several cities, citizen groups and individuals, and later joined by New Jersey, Florida, Texas, New Mexico, Arizona and the District of Columbia[2], filed suit in November 1988 in the United States District Court for the Eastern District of New York seeking to compel the U.S. Department of Commerce and the U.S. Census Bureau to undertake statistical estimation procedures to "correct" the results of the 1990 decennial census.[3] Plaintiffs alleged that by failing to

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[2]Two related district actions, *City of Atlanta v. Mosbacher*, No. 92-CV-1566 (N.D.Ga.) and *Florida House of Representatives v. Franklin*, No. 92-CV-2037 (N.D.Fla.), were later consolidated with the New York district court proceedings.

[3]Originally named as defendants were the President of the United States, the Department of Commerce and its Secretary, the Commerce Department's Under Secretary for Economic Affairs, the Census Bureau and its Director and the Clerk of the United States House of Representatives. Following the July 15, 1991, decision of then-Secretary of Commerce Robert Mosbacher not to adjust statistically the results of the 1990 census, the States of Wisconsin and Oklahoma intervened as defendants. Prior to the decision, Wisconsin filed suit in the United States District Court for the Western District of Wisconsin to enjoin adjustment, which it voluntarily dismissed following the adjustment decision. *State of Wisconsin v. United States Department of Commerce*, No. 91-C-0542-C (W.D.Wis. Sept. 10, 1991).

employ statistical estimation procedures as part of the 1990 census, defendants would fail to "take the most accurate census practicable, in violation of Article I, Section 2 of the Constitution, as amended by Section 2 of the Fourteenth Amendment," and would "take a census that discriminates with respect to fundamental rights against individuals residing in legislative districts that are disproportionately undercounted, in violation of the equal protection guarantee of the Fifth Amendment to the Constitution." C.A. App. 66. Statutory claims were asserted under 2 U.S.C. § 2a, 13 U.S.C. § 141 and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1337, 1361, 2201 and 2202, and 5 U.S.C § 702. C.A. App. 55.

A stipulation entered early in the case resulted in the Census Bureau's conducting a Post-Enumeration Survey (PES) used to derive statistically adjusted census counts. After reviewing the results of the PES, the Secretary of Commerce decided against substituting the adjusted numbers for the 1990 census results reported by President Bush on January 3, 1991, for the apportionment of Congress and which were then being used by the states in redistricting. On April 13, 1993, the district court upheld the Secretary's decision under the Administrative Procedure Act's arbitrary and capricious standard. On August 8, 1994, a divided panel of the Second Circuit ruled that the judgment of the district court be vacated and the case remanded for further proceedings to determine whether the decision not to adjust was necessary to the achievement of a legitimate governmental purpose. Dissenting, the late Judge Timbers noted that the court's decision was in conflict with the decisions of the Sixth and Seventh Circuits in *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1217, 127 L.Ed.2d 563 (1994); and *Tucker v. U.S. Dept. of Commerce*, 958

F.2d 1411 (7th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 407, 121 L.Ed.2d 332 (1992).

Unless the adjustment decision can be justified under the Second Circuit's standard, the court's decision will result in a mid-decade reapportionment of Congress, with Wisconsin and Pennsylvania each losing, and California and Arizona each gaining, one seat in the House of Representatives and elector in the Electoral College. The decision also threatens to throw into disarray state congressional and legislative redistricting accomplished following the 1990 census.

A. Claim to Statistical Estimation to Achieve the Most Accurate Census Practicable.

In *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964), this Court established what remains the basic standard under Art. I, § 2, for state congressional redistricting, that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." Because the census provides the population base for the distribution of political representation, by the time of the 1980 census, courts found it "but a short step from the reasoning employed in *Wesberry* to the conclusion that census figures must accurately reflect the populations of each state in order to preserve the efficacy of an individual's vote," *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980),[4] giving rise to the recognition of a judicially

[4]*See also Young v. Klutznick*, 497 F. Supp. 1318, 1323 (E.D.Mich 1980), *rev'd*, *Young v. Klutznick*, 652 F.2d 617 (6th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982) ("the necessity for an accurate population count among and within states is inexorably tied to fair apportionment of congressional seats); *Carey v. Klutznick*, 637 F.2d 834, 839 (2d. Cir. 1980) ("the public interest . . . requires obedience to the Constitution and to the requirement that Congress be fairly apportioned, based on accurate census figures.")

enforceable right to a "population count . . . which 'as nearly as is practicable' reflects the true population of the United States." *Cuomo*, 674 F. Supp. at 1104.[5] While Art. I, § 2, cl. 3, places decisions regarding the manner of conducting the census with Congress, "the question of whether the Constitution requires an adjustment be made in the official population count for the black and Hispanic undercount differential" was held "not for the Congress, but for the judiciary." *Young v. Klutznick,* 497 F. Supp. at 1326.

Plaintiffs' claim to the most accurate census practicable was framed by the problem of the "differential undercount"--that the census had been found to undercount minority populations at higher rates than non-minorities. Plaintiffs did not allege that the differential undercount resulted from invidious discrimination or that given its decision to adhere to an "actual enumeration," the Census Bureau did not attempt "to arrive at as accurate a figure as humanly possible." App. 99. Rather, plaintiffs claimed that the census undercount caused states and cities with large minority populations to be undercounted relative to other states and regions, resulting in their receiving less representation and federal monies than their actual populations would entitle them. C.A. App. 60-62, 65. Plaintiffs presented statistical estimation as the solution to this problem, framing the failure to employ this specific procedure as an unconstitutional failure to conduct the most accurate census practicable. *Id.* at 66.

[5]The district court's rulings that Art. I, § 2, creates a judicially enforceable right to as accurate a census as practicable are found at App. 67; 108-109; 123; 133-134.

B. Stipulation to Conduct Post-Enumeration Survey (PES).

Following the district court's denial of the Government's motion to dismiss and motion for summary judgment App. 121-134, the parties entered a stipulation, approved by the court on July 17, 1989, under which the Secretary of Commerce agreed to reconsider *de novo* whether to carry out a statistical adjustment of the 1990 census. C.A.App. 101-109. The stipulation required that the decision be made by July 15, 1991, and in accordance with published guidelines articulating the relevant technical and nontechnical statistical and policy grounds for the decision.[6] The stipulation also provided for the appointment of an eight-member Special Advisory Panel of statistical and demographic experts to advise the Secretary on the adjustment decision, with four members selected from a list submitted by the plaintiffs. *Id.* at 103-106, 109.

The Census Bureau undertook the vast statistical project of attempting to count every person living in the

[6]The district court subsequently upheld the guidelines established by the Commerce Department against the plaintiffs' challenge that they violated the stipulation and were biased against adjustment. App. 110-118. In the same decision, the court granted declaratory judgment that statistical adjustment would not violate either the Constitution's requirement of an "actual enumeration", U.S. Const. art I, § 2, cl. 3, or the provision of 13 U.S.C. § 195, directing the use of sampling in carrying out the Department's census functions, "except for the determination of population for purposes of apportionment of Representatives in Congress among the Several States . . . ." App. 107-110.

United States as of April 1, 1990, as planned,[7] resulting in a resident population count of the United States of 248,709,873 and an apportionment count of 249,632,692. App. 320. Pursuant to the parties' stipulation, the Census Bureau began conducting a Post-Enumeration Survey, or PES, nearly three months after the April 1 census date App. 336, to derive adjusted census counts.[8]

[7]The planning and procedures for the 1990 census are described in the Secretary's decision at App. 320-332 and in the district court's April 13, 1993, decision at App. 46-49.

[8]The PES procedure consisted of stratifying the population into 1,392 mutually exclusive poststrata, defined by geography, race/ethnic group, housing tenure, age and sex. App. 52, n.5; 164. Data obtained from a "P-sample" consisting of roughly 400,000 people, App. 56; 157, or approximately one-sixth of one percent of the national population, were matched to data obtained in the census (the "E-sample") to estimate census coverage rates for each poststratum. App. 76, n. 23; 169-170; 336-340. A poststratum was represented by an average sample of approximately 300 people. A.R. App. 13 at 3. The PES did not sample states individually, but aggregated them into nine census divisions. App. 164; 342-343; 370-372. The PES relied on the assumption of sample homogeneity--that persons in each poststratum were homogeneous with respect to their probability of being missed by the census. App. 79; 205.

Based on these sample observations, as well as the imputation of nearly nine million people for whom match status could not be determined, App. 75-76; 170, an estimate of the undercount or overcount rate for each poststratum, called an adjustment factor, was derived using the statistical technique of dual system estimation. App. 340-342. A technique known as "smoothing," converted raw adjustment factors into final adjustment factors. App. 57, n. 10; 219-227. Multiplying adjustment factors times the number of people counted in the census having the demographic characteristics of the sample poststrata produced synthetic population estimates. App. 57-58; 202-205. Through this process, roughly 6,000,000

"Selected PES" estimates were completed in June 1991. A.R. App. 10. As originally calculated, the PES estimated that the 1990 census had resulted in a 2.1% undercount of the national population.[9] App. 58. Consistent with earlier studies of census coverage, the undercount was found to be disproportionately higher for racial and ethnic minorities, estimated to be as high as 5.2% for Hispanics, compared to an estimated undercount of 1.2% for non-Hispanic whites. App. 58. The undercount rate also varied by state, although the relation between minority and state undercounts was at times counter-intuitive.[10] The June 1991 undercount estimates for every state in the New England, Middle Atlantic, East North Central and West North Central census regions were below the national average, A.R. App.

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unidentified people were added to the census by duplicating records of people counted in the census, while another 900,000 people actually counted in the census were deleted. App. 204.

[9]By the time of the Secretary's adjustment decision in July 1991, preliminary results of the Census Bureau's total error model indicated that the PES was biased towards overestimating the undercount and that a bias-corrected estimate would be approximately 1.4% rather than the estimated 2.1%, meaning that roughly a third of the net undercount adjustment came from bias in the PES. Bias was also found to be higher in minority evaluation strata. App. 180. In January 1993, the undercount was revised to 1.6%, based primarily on the correction of a computer error accounting for 0.4% of the original estimate. 58 Fed. Reg. 69, 73 (Jan. 4, 1993). Removing bias would have further reduced the undercount to between 0.9 and 1.2%. *Id.* at 75.

[10]For example, Montana, Idaho and Wyoming were each reported to have undercount rates roughly double those estimated for New Jersey, Michigan and Illinois. A.R. App. 10, Table 1. Rhode Island's estimated undercount of 0.3%, the lowest in the country, was one-fourth the undercount for non-hispanic whites nationally. *Id.*

10, Table 1, meaning that each state would lose population as a percentage of the national population using the adjusted numbers. Had the June 1991 estimates been used as the apportionment census, California and Arizona would have each gained one seat in the House of Representatives. Wisconsin and Pennsylvania would have each lost one seat. App. 17.

C. The Secretary's Adjustment Decision.

On July 15, 1991, then-Commerce Department Secretary Mosbacher announced his decision not to adjust the 1990 census.[11] App. 135-415. Explaining his decision, Secretary Mosbacher stated that the constitutional purpose of the census was not simply to count the total number of people in the United States but to locate them so that political representation could be allocated to the states and to their residents in proportion to their numbers. Accordingly, he concluded that the primary criterion for accuracy should be distributive rather than numeric accuracy. App. 200-201. The Secretary found that while the adjusted numbers appeared to come closer to giving the nation's total population than the enumeration census, the census numbers displayed greater distributive accuracy than the

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[11]The four members of the Special Advisory Panel selected from the plaintiffs' list recommended adjustment, while the four members selected by the Secretary opposed it. App. 59. Based on the Census Bureau's "loss function" analysis, the Census Bureau's Undercount Steering Committee voted 7-2 to recommend adjustment. App. 59. The late discovery of an error in the calculation of loss function values was subsequently reported to weaken, but not change, the majority's recommendation. App. 190-191; 244-245. The Director of the Census Bureau recommended in favor of adjustment, while the Under Secretary for Economic Affairs and the Administrator of the Economics and Statistics Administration recommended against adjustment. App. 59.

adjusted counts and represented the most accurate count of the population of the United States at the state and local levels.[12] *Id.* Noting that PES evaluation studies had not been completely analyzed by the time of the decision and that the statistical tools used to calculate and evaluate the adjusted counts were at the cutting edge of statistical research, Secretary Mosbacher expressed deep concern that if an adjustment were made, it would be on the basis of research conclusions that might very well be reversed in the next several months. App. 248.

The Secretary also identified policy considerations militating against adjustment. These included the sensitivity of the PES results to modeling assumptions and the resulting risk of political manipulation of future censuses App. 213-228, adjustment's disincentive to future census participation, including state and local support for

[12] The decision identified a number of issues bearing on both the numeric and distributive accuracy of the PES estimates. These included matching error, discussed at App. 171-172, the necessity of imputing match status for a significant number of sample observations, discussed at App. 169-171, the results of traditional hypothesis testing and the Undercount Steering Committee's loss function analysis, discussed at App. 184-192, 198-199, measured bias in the PES estimates, discussed at App. 179-181, evidence casting doubt on the validity of the homogeneity assumption, discussed at App. 204-213, concerns regarding smoothing of raw adjustment factors and the pre-smoothing of their variances, discussed at App. 219-227, and the estimates' lack of robustness to reasonable variations in the estimation procedures, discussed at App. 217-228. As an example of lack of robustness, the Secretary noted that the decision to exclude 28 out of 1,392 variance outliers during variance pre-smoothing had alone been sufficient to shift a House seat from Pennsylvania to Arizona. App. 220.

future censuses App. 228-238,[13] and the potential disruption to the orderly transfer of political representation that would result from changing the census numbers which had already been reported by the President for the apportionment of Congress and which were in the process of being used by the states in redistricting. App. 249-256.

D. District Court's Decision Upholding Decision Not to Adjust.

Following a thirteen-day trial consisting almost exclusively of expert demographic and statistical testimony App. 60-61, on April 13, 1993, the district court issued a decision upholding the Secretary's decision against adjusting the 1990 census. App. 43-95. As part of its decision, the court ordered the release of block-level adjusted data to the plaintiff states. App. 91-95.

Recognizing that *Franklin v. Massachusetts*, 505 U.S. ___, 112 S. Ct. 2767, 120 L.Ed.2d 636 (1992), had held that decisions concerning the apportionment census are unreviewable under the Administrative Procedure Act, the district court ruled that because the census also serves the statutory purpose of providing the population base for allocating federal funds and for intrastate redistricting, the Secretary's decision would be reviewed

[13] In recommending against adjustment, Under Secretary Darby pointed to Wisconsin as presenting a stark example of adjustment's disincentive to census participation. During the 1990 census, Wisconsin had undertaken a statewide public awareness campaign and targeted outreach program which resulted in the highest census mail response of any state--an accomplishment formally recognized by the Census Bureau. Yet Darby noted that Wisconsin stood to lose a seat in the House of Representatives and a portion of its share of federal funds precisely because of its low estimated undercount relative to other states. A.R., App. 6, at 40.

under the APA's arbitrary and capricious standard. App. 63-66. The court agreed with the Secretary's decision to focus on distributive, rather than numeric, accuracy, given the census's function in distributing political representation and economic benefits. App. 77-78. The court engaged in a detailed review of the adjustment decision under each of the Department's eight published guidelines. App. 69-89. Under Guideline One--"mandat[ing] that the actual count be considered the most accurate count of the population 'at the national state and local level, unless an adjusted count is shown to be more accurate'" App. 71-72, the court stated that the plaintiffs had failed "to illustrate affirmatively the superior accuracy of the adjusted counts either (1) at any level mentioned in Guideline One, or (2) for any reasonable definition of accuracy . . . ." App. 78. While finding the adjustment decision reasonable under each of the guidelines, the court commented, without explanation, that were it "called upon to decide this issue *de novo*, I would probably have ordered the adjustment." App. 89. Nevertheless, the court agreed with one of the Census Bureau's principal statisticians that "'reasonable statisticians could differ on this conclusion,'" ruling that the Secretary's decision had been neither arbitrary nor capricious. App. 91.

E. Court of Appeals' Decision.

All of the plaintiffs except California and Hudson County, New Jersey, appealed the district court's decision, arguing that because the case involved constitutional issues, it should be remanded for *de novo* review. On August 8, 1994, a divided panel of the United States Court of Appeals for the Second Circuit ruled that the judgment of the district court be vacated and the case remanded for further proceedings to determine whether the decision not to adjust was essential to the achievement of a legitimate governmental interest. App. 4; 39-40. In a brief dissenting opinion, Judge Timbers

noted the conflict between the court's decision and the decisions of the Sixth and Seventh Circuits. App. 40.

The court first rejected Wisconsin and Oklahoma's argument that statistical estimation of the apportionment census was barred by 13 U.S.C. § 195. App. 23-25. The court then reviewed the constitutionality of the adjustment decision under equal protection standards made applicable to the federal government by the Fifth Amendment. App. 31-33. The court interpreted the district court's decision as having "implicitly found that the census did not achieve equality of voting power as nearly as practicable."[14] App. 34. The court also viewed the decision to adhere to an acknowledged undercount as one which "disproportionately denies representation on the basis of race or ethnicity." *Id.* Both consequences were identified as requiring heightened scrutiny of governmental action. App. 33-34.

The court noted that under established congressional redistricting standards, once a plaintiff had shown "that a scheme was not the product of a good-faith effort to achieve equality, 'the burden shift[s] to the [governmental entity] to prove that the population deviations in its plan were *necessary* to achieve some legitimate state objective.'" App. 37, quoting *Karcher v. Daggett,* 462 U.S. 725, 740 (1983) (emphasis added). The court held that "the findings of the district court . . . plainly show that the plaintiffs carried their burden of proving that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable." App. 38. In

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[14]The court cited the feasibility of statistical adjustment and its lessening of the disproportionate undercount of minorities, as well as a finding that for most purposes and for most of the population, adjustment would result in a more accurate count than the original census. App. 34.

particular, the court identified the Secretary's acknowledgement that the adjusted numbers would likely make the census more accurate nationally and reduce the disparate impact of census inaccuracies on minority groups, the valuing of distributive over numeric accuracy, the Secretary's concerns regarding potential manipulation of, and disincentives to participation in, future censuses, and the foreseeability of the differential undercount. App. 38-39. Summarizing, the court stated "that plaintiffs amply showed that the Secretary did not make the required effort to achieve numerical accuracy as nearly as practicable." App. 39. The court's only statement regarding the adjustment decision's effect on equality of representation in Congress was to characterize the decision as one in which the Secretary "would decline to make the generally improving adjustment that would lessen the disproportionate undercounting of minorities if it would result in a distribution of Representatives that would be different from the present distribution, although just as accurate." App. 38. The court did not discuss the effect of the adjusted and unadjusted numbers on equality in intrastate districting. Stating that the proper standard of review was not the arbitrary and capricious standard, but the "more traditional standard applicable to an equal protection claim that a fundamental right has been denied on the basis of race or ethnicity," the court held that the burden shifted to the Secretary to show that the result of undercounting minorities furthered a legitimate governmental objective and was essential for the achievement of that objective. App. 39-40.

REASONS FOR GRANTING THE PETITION

As Judge Timbers recognized, the decision of the Second Circuit is in conflict with the decisions of the Sixth and Seventh Circuits in *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1217, 127 L.Ed.2d 563 (1994); and *Tucker v. U.S. Dept. of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, ___ U.S.

___, 113 S. Ct. 407, 121 L.Ed.2d 332 (1992). The case is also of great national importance. Unless the decision not to adjust can be justified under the standard established by the Second Circuit, the court's decision will result in a mid-decade reapportionment of Congress and cast significant doubt on the validity of state congressional and legislative districts established following the 1990 census. The case raises fundamental questions concerning the ability of the federal judiciary to decide the best method for conducting the census and the proof necessary to warrant a judicial reallocation of the states' rights of representation in the national government. By failing to examine the relation between census accuracy and equality of representation, the decision of the court of appeals will result in an arbitrary reallocation of the states' representation in Congress, not in improved equality. More broadly, the case was premised on the recognition of the courts' ability to decree equality by mandating a specific procedure for conducting the most accurate census practicable. The recognition of this claim has spawned two decades of protracted litigation which, for failing to improve equality, has succeeded in transforming a process intended to confer finality on the decennial reallocation of political representation into one of recurring and prolonged uncertainty. The tremendous complexity of the statistical and policy issues underlying the adjustment decision serves to focus the sufficiency of affirmative claims to particular census procedures to a degree that abstract consideration of the possible relation between undercounts and equality cannot. The decision of the case will therefore not only resolve the validity of the distribution of political representation among and within the states for the remainder of this decade, but will determine whether the inability to confer finality on the decennial reallocation of representational rights will continue into the next century.

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THE SIXTH AND SEVENTH CIRCUITS.

In *Tucker,* the Seventh Circuit upheld the dismissal of a suit seeking to compel "an appropriate statistical adjustment for the undercount" in the 1990 census. Tucker, 958 F.2d at 1412. In *City of Detroit*, the Sixth Circuit upheld summary judgment dismissing a claim seeking to compel statistical adjustment of the 1990 census or to compel a recount of Detroit's residents, 4 F.3d at 1375-78, and affirmed the dismissal for lack of standing of a claim that unadjusted census data would result in inequalities in intrastate districting. *Id.* at 1372-74. The Second Circuit's discussion of these decisions was limited to noting *Tucker's* recognition that redistricting cases do not place on plaintiffs any burden of proving that district inequality represents a deliberate effort to dilute an affected group's voting power. App. 36, citing *Tucker*, 958 F.2d at 1414.

Both decisions are in direct conflict with the result reached by the Second Circuit, reflecting a much greater skepticism concerning a court's ability to decide questions of statistical method in the guise of enforcing the Constitution. In *Tucker*, the court was unable to find in the apportionment clause, the census statutes or the Administrative Procedure Act guidelines for taking an accurate decennial census. The court stated that the relevant statutes were so nondirective, that a court might as well turn the decision of how to conduct a census or what to do about undercounts "over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add to its rationality or fairness." *Tucker*, 958 F.2d at 1418.

While this Court's decision in *Franklin v. Massachusetts* casts doubt on *Tucker's* specific holding

that the plaintiffs lacked standing in the sense of having litigable rights, 958 F.2d at 1416-17, the Seventh Circuit's analysis of the plaintiffs' claims was predictive of the standard of review later established by this Court. The Seventh Circuit ruled that challenges to the census are not political questions. *Id.* at 1415. The court also recognized the judiciary's ability to decide census questions where established constitutional principles provide the grounds of decision, as in a case concerned with discrimination rather than innocent inaccuracy or, less clearly, with respect to a challenge to a categorical judgment of inclusion or exclusion argued to be in violation of history, logic, and common sense. *Id.* at 1418, citing *Com. of Mass. v. Mosbacher*, 785 F. Supp. 230 (D.Mass. 1992), *rev'd sub. nom. Franklin v. Massachusetts*. In contrast to these types of claims, the Seventh Circuit held that merely by directing congressional apportionment in accordance with the decennial census, "Article I, section 2, clause 3 does not authorize lawsuits founded on disagreement with the Census Bureau's statistical methodology." *Tucker,* 958 F.2d at 1418. The court also contrasted the judicially administrable standard of voting equality in redistricting cases, stating that the plaintiffs were not asking the court to decree equality, but "to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to the census headcount." *Tucker*, 958 F.2d at 1418.

In *City of Detroit*, 4 F.3d at 1377-78, the Sixth Circuit followed *Tucker's* reasoning, relying as well on the district court's decision in this case. An important aspect of the Sixth Circuit's decision was its conclusion that states may use statistically adjusted census data for congressional redistricting, relying on *Karcher* and the court's decision in *Young v. Klutznick*, 652 F.2d 617, 624 (6th Cir. 1981) *cert. denied*, 455 U.S. 939 (1982). *City of Detroit*, 4 F.3d at 1373-74. The Ninth Circuit has reached the same conclusion. *Assembly of State of Cal. v. U.S.*

Dept. of Commerce, 968 F.2d. 916, 918, n. 1 (9th Cir. 1992). This holding is important because of its bearing on claims that the apportionment census be adjusted to improve representational equality at the intrastate level, regardless of whether the adjustment improves equality in the apportionment of Congress. The Second Circuit did not address the plaintiffs' ability to use the adjusted data which the district court had ordered released to achieve equality of representation in the creation of their own congressional and legislative districts.

II. THE CASE IS IMPORTANT.

A. Unless the Decision Not to Adjust the 1990 Census is Shown to be Necessary to Achieve a Legitimate Governmental Purpose, the Decision of the Court of Appeals Will Result in a Mid-Decade Reapportionment of Congress and Will Cast Significant Doubt on the Validity of State Congressional and Legislative Districts Established Following the 1990 Census.

This case goes to the core of the states' rights of representation in the national government. An order compelling the use of the June 1991 adjusted census numbers would change the apportionment of Representatives for Pennsylvania, Wisconsin, California and Arizona from the apportionment reported by President Bush to Congress on January 3, 1991. Statistical adjustment would also change the apparent populations of congressional districts established following the 1990 census in the other 39 states apportioned more than one Representative. Because Art. I, § 2 requires state congressional districts to achieve precise

mathematical equality,[15] adjusting the 1990 census would call into serious question the validity of these states' congressional districts. Indeed, if the Sixth and Ninth Circuits are incorrect that states are not required to use the official census counts in congressional redistricting, it is impossible to imagine compelling a new apportionment of Congress, where the goal of exact representational equality is illusory, *U.S. Dept. of Commerce v. Montana*, 503 U.S. 442, 112 S. Ct. 1415, 118 L.Ed.2d 87 (1992), while not requiring new congressional districts to be drawn, where exact equality provides the controlling standard. States whose Constitutions require the use of census data for legislative redistricting[16] would potentially face state constitutional challenges to the validity of their legislative districts. To say that these consequences would be potentially disruptive of the orderly transfer of political representation is to engage in understatement.

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[15] *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-531 (1969); *Karcher v. Daggett*, 462 U.S. at 734.

[16] *See, e.g.*, N.Y.Const. Art. III, § 4 ("[E]ach federal census taken decennially . . . shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts next occurring"); Wis. Const. Art. IV, § 3 ("At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants.")

B. The Decision of the Court of Appeals Raises Important Issues Concerning the Courts' Ability to Decree Equality by Mandating the Use of Specific Census Procedures or Results.

Montana, 112 S. Ct. at 1425, held that decisions affecting the apportionment of Congress are justiciable. *Franklin v. Massachusetts*, 112 S. Ct. at 2776, n. 2, extended this holding to census decisions affecting apportionment. Under *Franklin v. Massachusetts*, decisions concerning the census, while not reviewable under the Administrative Procedure Act, will be reviewed for consistency with the language of the Constitution and with the constitutional goal of equal representation.[17] 112 S. Ct. at 2777.

1. Consistency with constitutional text and history.

Plaintiffs' claim was cast solely in terms of the predicted consequence of not estimating the census on equality of representation. Plaintiffs did not assert any textual inconsistency in a decennial census which adhered to the historic practice of an actual headcount.[18] Accordingly, the more relevant inquiry is not whether a decision not to adjust is consistent with constitutional text and history, but whether statistical estimation of the decennial census satisfies this standard.

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[17]Thus, while 13 U.S.C. § 195 appears as a congressional direction that sampling not be used to estimate the apportionment census, it would remain necessary to decide whether that decision represents a constitutional exercise of Congress' census powers.

[18]*See* Act of March 1, 1790, 1 Stat. 101.

Adjusting the census would represent the first time in the nation's history that the states' apportionment populations would be based on counts in other states,[19] and is inconsistent with the textual requirement that representation be apportioned among the states "according to their respective numbers, counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2. The timing of the estimates was also inconsistent with the census's constitutionally time-constrained function of providing population totals for the allocation of representational rights over the next ten years. Precise dates for reporting the states' apportionment populations to the President and for reporting the states' apportionments to the Congress and to the states are established in 2 U.S.C. § 2a(a) and (b) and 13 U.S.C. § 141(b).[20] Under 13 U.S.C. § 141(c), data for state redistricting is to be provided no later than

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[19]App.251-252. For all but the largest states, the PES estimates relied on sample data obtained primarily from other states. App. 370-373. The estimates derived for the South Atlantic Census division included sample data from the District of Columbia, which is not a state. App. 252. Special Advisory Panel member Kenneth Wachter found that the use of other-state data to estimate each state's population affected the apportionment of Congress. App. 303-304.

[20]Under 13 U.S.C. § 141(b), the Secretary is required to report the states' populations to the President by December 31 of the census year. The President is directed to report the states' populations and apportionments within the first week of the first session of Congress in the year following the census. 2 U.S.C. § 2a(a). The President's report establishes a state's entitlement to a particular number of Representatives. 2 U.S.C. § 2a(b); *Franklin v. Massachusetts*, 112 S. Ct. at 2773. Within 15 days after the President's report, the Clerk of the House of Representatives is required to transmit to each state a Certificate of Entitlement showing its apportionment. 2 U.S.C. § 2a(b).

twelve months after the April 1 census date. The PES estimates were not available until after the apportionment of Congress and the transmittal of state redistricting data. To hold that the timely completion and reporting of the census is of no consequence[21] is to ignore the need to confer certainty and finality on the constitution of, and the states' entitlement to representation in, the national government. Drawing new congressional and legislative districts is both a duty and right of the states. The later states are told the number of Representatives they can elect to Congress and the later they receive data to conduct redistricting, the less their ability to complete redistricting before the next elections.

A broader conflict arises between the recognition of a judicially enforceable right to compel a specific census procedure and Congress' express constitutional authority to direct the manner of conducting the census. A claim that a particular census procedure is mandated differs from a claim that the selected census procedure is constitutionally proscribed, as was asserted in *Franklin v. Massachusetts*. *See also Tucker*, 958 F.2d at 1418 (distinguishing challenge to a categorical judgment of inclusion or exclusion argued to be in violation of history, logic, and common sense). If courts are to decide which procedures will achieve the most accurate census practicable, then unless Congress directs that the census be taken in a manner that a court agrees will achieve the greatest practicable accuracy, Congress' decision will be unconstitutional. States perceiving an advantage in a particular census methodology will forego advancing their interests in Congress, where all states are represented, in favor an original district court action, where adversely affected states often are not represented.

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[21]As held by the district court at App. 126-127, citing *Carey v. Klutznick*, 637 F.2d at 837, and *Young v. Klutznick*, 497 F. Supp. 1318.

The source of the conflict stems from the inherently legislative nature of the decision of how best to conduct the census, and the lack of judicially administrable standards for making that decision, rather than any disagreement over the desirability of conducting an accurate census. In this case, the claim to a judicially enforceable right to the most accurate census practicable was premised on the census's function in allocating representation, viewed in light of the congressional redistricting standard requiring states to achieve, as nearly as practicable, precise district population equality. Beyond this, the analysis has not gone further than the substitution of the phrase "census accuracy" for "population equality" in the congressional redistricting standard. Yet the fact that two phrases can be made to serve the same grammatical function provides little reason for concluding that their substitution results in comparable, or even meaningful, legal standards.

Whether a state redistricting plan achieves population equality is known the moment population levels are calculated. Where a plan achieves less than exact equality, determining whether greater equality is practicable requires only that a party challenging a state plan present an alternative plan having smaller population deviations. The goal of exact equality is realistic and appropriate, not only for state redistricting decisions, *Montana*, 112 S. Ct. at 1429, but for courts reviewing redistricting plans or fashioning their own.

For the census, what is practicable consists of the set of all possible census procedures for which plausible arguments can be advanced for why they would improve the accuracy of the counts--for example, hiring additional enumerators, simplifying census forms, expanding targeted out-reach programs, providing monetary incentives for census participation on the part of difficult-to-count populations. The choice of procedures for taking the most accurate census requires the balancing of

technical and policy trade-offs, often entailing resource allocation decisions, coupled with complex and uncertain predictions concerning a specific methodology's effect on representational equality, as to which "[n]either mathematical analysis nor constitutional interpretation provides a conclusive answer." *Montana*, 112 S. Ct. at 1429.

The specific procedure advanced by the plaintiffs involved tremendously complex statistical issues. Moreover, the risk that estimation will make the census vulnerable to political manipulation, adjustment's dependence on modeling assumptions and methodological choices potentially affecting the apportionment of Congress, its disincentive to active census participation, its reinforcement of broader trends of non-participation in the process of self-government and its penalization of states which make the greatest efforts to encourage participation in that process raise policy issues of a kind not present where the question is whether to hire more enumerators or to simplify census forms.

2. Consistency with the constitutional goal of equality of representation.

These considerations lead to the review of the adjustment decision for its consistency with the constitutional goal of equal representation. The court of appeals incorrectly concluded that because the adjusted numbers were thought to display greater numeric accuracy than the census[22] and because they "corrected" for the differential undercount, the decision against adjustment failed to achieve equality of representation as nearly as practicable and disproportionately denied representation on the basis of race or ethnicity. It was on the basis of these conclusions that the court applied the

[22]*But see*, n. 9, *supra*.

heightened equal protection and Art. I, § 2 redistricting standard, requiring the adjustment decision to be justified as necessary to the achievement of a legitimate governmental purpose. Review of the court of appeals' decision will determine whether its conclusions regarding the impact of the adjustment decision on equality of representation were correct, warranting review of the decision under this heightened standard.

In *Franklin v. Massachusetts*, 112 S. Ct. at 2778, the Court found that the Secretary's judgment to include overseas personnel in the apportionment census did not hamper the goal of equal representation, but, on the assumption that employees temporarily stationed abroad retained their ties to their home states, would actually promote it. Given that military personnel could not change home of record designations after entering the service and given the Defense Department's acknowledgement of a high "error rate" in home of record data, *see id.* at 2786 and n. 22 (Stevens, J., concurring), the Court's conclusion suggests that the choice of census methodology is required to bear a rational, rather than an exact mathematical, relation to the goal of representational equality. However, the Court also commented that the appellees had clearly failed to demonstrate that eliminating overseas employees from state counts would make representation in Congress more equal, citing the threshold redistricting standard requiring parties challenging state apportionment legislation to prove disparate representation. *Id.* at 2778, citing *Karcher*, 462 U.S. at 73.

Delay in completing and reporting the census conflicts with the goal of representational equality by impairing the states' ability timely to complete redistricting, which in turn impairs the meaningful exercise of the right to vote. To the extent adjustment undermines state and local efforts to encourage census participation, as well as individual incentives to fulfill this

single duty of national citizenship, it hinders the goal of representational equality by impairing the ability to take future censuses. Statistical estimation also acquiesces in, if it does not help to perpetuate, broader trends of non-participation in the processes of self-government, particularly by groups historically excluded from those processes. While held to constitute a political question, *Sharrow v. Brown*, 447 F.2d 94 (2d Cir. 1971), *cert. denied*, 405 U.S. 968 (1972), the provision of Section 2 of the Fourteenth Amendment for the reduction of states' apportionment populations in proportion to the percentage of their adult citizens whose right to vote is denied or abridged, reflects a constitutional judgment that states' population-based representational rights in the national government be tied to the degree to which their citizens are extended the right to participate in the elective process. By penalizing states like Wisconsin, whose participation in the census is matched by high citizen participation in the elective process,[23] statistical adjustment works exactly the opposite result.

Franklin v. Massachusetts suggests the possibility of assessing challenges to census decisions under the redistricting standard requiring plaintiffs challenging a state plan to demonstrate that a different plan would improve equality--in the case of the census, that different numbers would improve equality of representation in

[23]Wisconsin imposes a ten day residence requirement on voting and does not require voter registration. *See* Wis. Stat. § 6.55 (eligible voters permitted to vote by producing evidence of current address on day of election). The state has one of the highest rates of voter participation in the nation, both for minority and non-minority voters. *See* U.S. Bureau of the Census, *Current Population Reports, P 20-440*, "Voting and Registration in the Election of November 1988," pp. 36-40 (1989); U.S. Bureau of the Census, *Current Population Reports, P 20-466*, "Voting and Registration in the Election of November 1992," pp. 23-30 (1993).

Congress. The court of appeals did not state that the district court had made this finding, but referred more generally to the court having "implicitly found" that the enumeration census failed to achieve equality of representation as nearly as practicable.

The inability to achieve, or even approximate, precise equality in the apportionment of Congress, *Montana*, 112 S. Ct. at 1426-29, makes the relation between census accuracy and representational equality somewhat inexact, even assuming that "true" population totals could be known. Moving a Representative from one state to another, where the populations of both are close to establishing priority to the 435th seat in the House of Representatives, shifts, rather than eliminates, the inequality inherent in any method of apportionment.[24]

The more important problem stems from the inability to know the states' "true" populations. Small overestimates of the undercount for states whose priorities are just below, and/or underestimates of the undercounts for states whose priorities are at or just above, the level needed to be apportioned the 435th House seat can easily cause a deterioration in the apportionment of Congress. Coupled with this is the imprecision of the PES estimates. With respect to the 1990 census, a court attempting to improve representational equality by changing census numbers was presented with statistical estimates subject to significant sampling variance and

[24]For example, in *Montana*, 112 S. Ct. at 1427, the Court noted that increasing Montana's apportionment to two Representatives and reducing Washington's to eight would result in Montana having 401,838 residents per Representative and Washington, 610,993. Leaving the apportionment unchanged resulted in 803,655 Montana residents being represented by a single Representative, compared to 543,105 residents per Representative for Washington.

measured bias, whose imprecision was compounded by serious questions regarding the correct determination and imputation of match status, the validity of assuming sampling homogeneity and the appropriateness of, and bias inherent in, the smoothing methodology. Stated otherwise, a state's claim to an additional House seat which is premised on the use of biased estimates, an undiscovered computer error accounting for one-fifth of the undercount, and the decision to exclude 28 out of 1,392 variance outliers during variance pre-smoothing does not invoke "a substantive principle of commanding constitutional significance." *Montana*, 112 S. Ct. at 1429.

The district court expressly found that the plaintiffs had failed to demonstrate at the national, state or local level that the adjusted numbers were superior to the census numbers for any reasonable definition of census accuracy. App. 78. The court of appeals appears also to have recognized that equality in the apportionment of Congress would not be improved by substituting the adjusted numbers, describing the Secretary's decision as one in which he would decline to adjust the census "if it would result in a distribution of Representatives that would be different from the present distribution, although just as accurate." App. 38. The phrase "just as accurate" implies "not more accurate."

The court of appeals misapprehended the relation between census accuracy and representational equality. Numeric accuracy is essentially immaterial to the issue of representational equality at any level, and particularly at the national level. *See* App. 182-183 (explaining that improving numeric accuracy can cause representational equality to deteriorate). The PES's confirmation of the differential undercount also failed to demonstrate the Secretary's ability to improve representational equality by using the adjusted numbers to correct for--or more accurately, given the bias in the PES, to overestimate--the undercounts. The court of appeals merely assumed that

because minority undercounts were higher, on average, than non-minority undercounts, the census denied representation on the basis of race or ethnicity. Representatives in Congress are apportioned to states, not racial or ethnic groups. The effect of changing a state's apportionment is the same for all its residents, regardless of race or ethnicity. Whether a particular ethnic or racial group's representational rights can be improved through a different apportionment of Congress is the same question as whether the apportionment can be improved. Unless adjustment will improve equality in the apportionment, all that is accomplished by shifting seats in Congress from states with relatively small minority populations to states with relatively large minority populations is an arbitrary reallocation of political representation.

Franklin v. Massachusetts concerned only the apportionment census and therefore did not address the question of whether a claim that a specific census procedure might improve equality in intrastate districting would warrant changing the apportionment census in the absence of a finding that doing so would improve equality of representation in the apportionment of Congress. With the adoption of the Sixteenth Amendment, the census has the single constitutional purpose of providing the states' populations for apportioning Congress. *See Carey v. Klutznick*, 653 F.2d 732, 736 (2nd Cir. 1981). The role of the census in providing population data for intrastate districting is statutory, rather than constitutional. 13 U.S.C. § 141(c). If this statutory function makes non-apportionment census decisions separately reviewable, they would be reviewable under the Administrative Procedure Act's arbitrary and capricious standard. *Cf. Franklin v. Massachusetts*, 112 S. Ct. at 2783, n. 14 (Stevens, J., concurring). The plaintiffs did not challenge the district court's findings that the Secretary's decision satisfied this standard.

More importantly, if states are permitted to use statistically adjusted data in redistricting, as both the Sixth and Ninth Circuits have ruled, then changing the apportionment census to improve intrastate equality represents a case of constitutional overkill. The district court ordered the release of block-level adjusted numbers to the plaintiff states in April 1993. Adjusted block-level data for California had earlier been obtained in a separate Freedom of Information Act lawsuit. *Assembly of State of Cal. v. U.S. Dept. of Commerce*, *supra*. If the plaintiff states know, as they claim to know, that census data are under-representative, they "can, and should, utilize noncensus data in addition to the official count in [the] redistricting process." *Senate of State of Cal. v. Mosbacher*, 968 F.2d, 974, 979 (9th Cir. 1992). To the extent they have not done so, their commitment to principles of equality, like their belief in the superior accuracy of the adjusted numbers, rings hollow. To the extent they have used the adjusted numbers to redistrict, changing the decennial census five years into the decade is to no purpose.

CONCLUSION

The State of Wisconsin respectfully requests that this Court grant this petition for writ of certiorari.

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